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3 The Honorable John C. Coughenour  
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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

8 UNITED STATES OF AMERICA,

No. CR20-032 JCC

9 Plaintiff,

10 v.  
11 KALEB COLE,  
12 Defendant.

RESPONSE TO GOVERNMENT'S  
MOTION IN LIMINE REGARDING  
UNDERCOVER OFFICER'S  
PSEUDONYM

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14 I. **Introduction**

15 Defendant, Kaleb Cole, by undersigned counsel, respectfully submits that the Court  
16 should deny the government's motion in limine to permit the undercover officer to testify under  
17 a pseudonym. This objection is based on Confrontation Clause of the Sixth Amendment and the  
18 following memorandum of law.

19 II. **Background**

20 In preparation for trial, the government submitted a motion in limine requesting the Court  
21 allow the undercover officer to testify using a pseudonym at trial. The officer's alleged  
22 interactions with Mr. Cole are a significant part of the government's case, as the officer recorded  
23 conversations with Mr. Cole. The government's reasons for this request include concerns for the  
24 officer's safety and concerns about compromising the officer's current undercover operation.

1 Despite these concerns, allowing the officer to testify using a pseudonym violates Mr. Cole's  
 2 Sixth Amendment right to confront the witnesses against him.

3 **III. Argument**

4 The Confrontation Clause of the Sixth Amendment guarantees a defendant facing criminal  
 5 charges the fundamental right to cross-examine adverse witnesses. Smith v. Illinois, 390 U.S.  
 6 129, 133 (1968). One of the policies underlying the Confrontation Clause is the defendant's  
 7 opportunity to "put the weight of his testimony and his credibility to a test." Id. at 132. To  
 8 determine whether a court may withhold a witness's name, a court balances the defendant's right  
 9 to confront witnesses against the government's interest in not compromising investigations and  
 10 in protecting the witness's identity. United States v. Gil, 58 F.3d 1414, 1421 (9th Cir. 1995). The  
 11 balancing test involves three factors: (1) the degree to which the witness was involved in the  
 12 activity; (2) how helpful the witness's testimony would be to the defendant; and (3) the  
 13 government's interest in non-disclosure. Id.

14 To adequately assess the credibility of a witness, a defendant must be able to ask witnesses  
 15 who they are. The Supreme Court addressed this in Smith v. Illinois, where the prosecution's star  
 16 witness against a defendant in a drug case was a man who testified using a pseudonym. 390 U.S.  
 17 at 130-31. The court held that the defendant had the right to ask the witness his true name because  
 18 "when the credibility of a witness is an issue, the very starting point in 'exposing falsehood and  
 19 bringing out the truth' through cross-examination must necessarily be to ask the witness who he  
 20 is." Id. at 131 (quoting Pointer v. Texas, 380 U.S. 400, 404 (1965)).

21 While courts have held that a trial judge has significant discretion in determining the scope of cross-examination, a Court cannot completely limit examination of a witness's  
 22 credibility. Id. When the government believes there is a concern for a witness's safety, the  
 23

1 government bears the burden of demonstrating that “the threat to the witness [is] actual and not a  
 2 result of conjecture.” United States v. Palermo, 410 F.2d 468, 472 (7th Cir. 1969).

3 The government has not met its burden of showing that the threat to the officer is “actual”  
 4 rather than “conjecture.” In support of its motion in limine, the government provides screenshots  
 5 of messages from a person expressing interest in the undercover officer’s identity. While the  
 6 government contends that this is concerning because the poster has been identified as a neo-Nazi  
 7 extremist, the poster does not make any threats towards the officer in these messages. The  
 8 individual makes no suggestions that he or anyone else intend violence or harassment towards the  
 9 officer. Thus, the screenshots provided do not show an “actual” threat.

10       Although the government expresses additional concern about the individual’s wanting to  
 11 know the officer’s identity because “Atomwaffen members have been linked to multiple acts of  
 12 violence,” it has made no showing that the particular individual expressing interest in the officer’s  
 13 identity is violent. Nor has the government presented evidence even suggesting the poster of these  
 14 messages is connected in any way to Mr. Cole or Atomwaffen. Even if the poster were connected  
 15 to Atomwaffen, simple membership in a group where a few members have committed violent  
 16 acts does not automatically lead to the conclusion that each member of the group is violent.  
 17 Furthermore, the government’s suggestion that this individual’s interest in the officer’s identity  
 18 is a “continuation” of the course of conduct Mr. Cole is accused of is unsupported. Beyond  
 19 attempting to obtain the identity of the officer, the government provides no evidence showing that  
 20 the poster or others associated with the poster threatened or will threaten the officer if his identity  
 21 is discovered. And, of course, threatening an FBI agent would not represent a continuation of the  
 22 conduct alleged in this case; it would be a different matter entirely. Thus, the government’s  
 23 contention is pure speculation and they have not met their burden of showing actual threat.  
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1 The government also contends that identification of the officer will compromise the officer's  
2 current and future investigations. While the defense acknowledges this concern, Mr. Cole's right  
3 to confront the witnesses against him outweighs this concern. Although the identity of the officer  
4 may not impact the substance of the questioning, it will impact Mr. Cole's ability to cross-  
5 examine the officer about his credibility. Smith, 390 U.S. at 130. Adequate assessment of the  
6 officer's credibility includes the ability to ask the officer's identity and background. Such  
7 questions will allow the jury to assess the credibility and weight of the officer's testimony.  
8 Considering the likely importance of the officer's testimony in this case, Mr. Cole's right to  
9 confrontation requires he be able to question the officer about his identity and background.

10 **IV. Conclusion**

11 For the foregoing reasons, the defense respectfully requests that the Court deny the  
12 government's motion in limine to permit the undercover officer to testify using a pseudonym.

13 Respectfully submitted this 21<sup>st</sup> day of September, 2021.

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